

**IN THE EMPLOYMENT RELATIONS AUTHORITY
AUCKLAND**

AA 215/09
5107772

BETWEEN

RESHAM SINGH
First Applicant

SUKHJIT KAUR
Second Applicant

AND

ELITE GRACE GROWERS
LIMITED
Respondent

Member of Authority: Dzintra King

Representatives: Gurjinder Singh, Advocate for Applicants
Parvez Akbar, Counsel for Respondent

Investigation Meeting: 16 February 2009

Submissions received: 6 March 2009 from Applicants
17 March 2009 from Respondent

Determination: 30 June 2009

DETERMINATION OF THE AUTHORITY

Employment Relationship Problem

[1] The applicants, Mr Resham Singh and Ms Sukhjit Kaur, say they have been unjustifiably dismissed, that annual leave payments have been illegally deducted and that no payment has been made for days in lieu for working statutory holidays.

[2] The respondent, Elite Grace Growers Limited, says that no dismissal has taken place and that it has endeavoured to make annual leave payments as required by a Labour Inspector but that these payments have been rejected by the applicants. The respondent says that public holidays were not worked and consequently no days in

lieu are owed. The respondent further says that the applicants' personal grievance was not filed within 90 days.

[3] The matters to be decided in this determination relate to the 90 day issue, the statutory holiday matter and annual leave issue.

Background

[4] On 15 July 2005 both applicants were employed by the respondent as glasshouse workers. Mr Bhupinder Singh is the director of the respondent.

[5] In December 2005 the applicants asked for leave to go to India. This was declined. Nevertheless, the applicants went to India. The employer treated this as a termination of the employment and told the applicants that if there were positions available when they returned he would consider them for reappointment. Mr Singh and Ms Kaur were reappointed with effect from 13 and 14 February 2006. Mr Gavri wrote to the applicants stating "You are however started on permanent contract as before and will be eligible for sick leave and will commence on the same hourly rate."

[6] No employment agreement was signed.

[7] The applicants contend that there was no new period of employment and that there had been a period of leave without pay. There was no period of leave without pay. There is no evidence of any such arrangement being entered into. The employment terminated per virtue of the applicants' leaving their employment to go to India.

[8] The circumstances of the applicants' departure following the second period of employment (from 13 and 14 February 2006 to 27 January 2007) are in dispute. However, it is agreed that the applicants decided to terminate their employment. Mr Gavri says he was told of the proposed departure on 26 January 2007 and that they intended to work for NZ Hothouse as from 30 January 2007. He told them they had not given proper notice and they would lose their holiday pay. He said they asked that they be paid for 29 January, which he did as a gesture of good will. Although the applicants contended that they had not been paid for Auckland Anniversary Day the

evidence shows that they had been paid. The applicants contend they have been constructively dismissed.

[9] Mr Gavri did not pay the applicants their holiday pay.

Employment Agreement

[10] The applicants were employed previously by KPH (NZ Hothouse). The applicants had an employment agreement with KPH. It seems that KPH had given a copy of the KPH contract to a Mr Sukinder Singh, a son of a friend of the applicants, who took it home and Mr Sukinder Singh explained it.

[11] Mr Gavri said there was a meeting in the tea room at the respondent's premises on 15 July 2005 and the applicants and other employees agreed to the same contract they had been working under previously. The applicants neither speak nor read English. Mr Gavri said the meeting and the contract were interpreted for those without English language skills.

[12] There were, however, changes to that contract which Mr Singh itemised as follows:

- a. Overtime would not commence until 54 hours had been worked
- b. Holiday pay would be on a pay as you go basis
- c. There would be a six month appraisal
- d. Any employee who wished to could return to work for the previous employer
- e. No pay rises would given until employees had worked for a year
- f. Changes to sick leave notification provisions

[13] The parties to the employment agreement are stated to be the respondent and "Collective Ex NZ Hot House Employees represented by Gurdwar Singh, the Team Leader, the 'Employee'." The agreement is signed by Gurdwar Singh and not by either of the applicants or any of the other employees listed in the document. Clause 3.1 states that the employment agreement is a collective employment agreement

entered into under the Employment Relations Act 2000. It is no such thing. The Collective Ex NZ Hot House Employees is not a registered union and there was no evidence that any bargaining had taken place.

[14] The agreement is 9 pages long and has 16 clauses. I do not accept that the employees present at the tea room meeting could have fully comprehended and given informed consent to the agreement with which they were presented. In addition to the fact that it would be very difficult to follow and understand a properly formulated employment agreement in such circumstances the agreement in question contains confusing and contradictory clauses.

[15] It purports to be a casual employment agreement for a fixed term which is to start on 16 July 2005 and end on 16 July 2007. The rationale for the fixed term is to ascertain the efficiency of the worker. The agreement provides three weeks' annual leave after the first year of continuous employment and sets out the times when that leave may be taken. It also states that the employer will pay holiday pay at the same time as salary payments, that is, pay as you go. This holiday pay is said to be inclusive for the first twelve month period of continuous employment. It provides for sick leave and bereavement leave.

[16] The termination clause provides for two weeks' notice by either party. In the event that the employee fails to give such notice the employer can "withhold all employment termination dues".

[17] The hourly rate for the employees for the first year is set out at the end of the agreement and includes 6% holiday pay "rounded off". The rate for the applicants was \$11 for Mr Singh and \$10 for Ms Kaur.

[18] This was not a valid employment agreement. It was not signed by the applicants and I am not satisfied that they comprehended its terms. A similar situation arose in *DV Ryboproduct Ltd v The 49 Crew of the MFV "Aleksandr Ksenofontov"*, 30/1/07, J Crichton (Member), CA10/07. In that case, although the crew had entered into the contract in writing, and thus had given a form of consent, the Authority concluded that the crew had not given informed consent and entered into the contract vicariously through the captain and the captain's explanations.

Notice and deductions

[19] Deductions from wages can only be made in accordance with the Wages Protection Act which provides that subject to sections 5 (1) and 6 (2) an employer is to pay the worker the entire amount of wages when they become payable. Neither section applies in this instance.

[20] The employer cannot use purported collective employment agreement to justify the making of deductions from the applicants' final pay. Section 5 (1) (a) and (b) Wages Protection Act provide that deductions can only be made with the worker's written consent or upon the written request of the worker.

[21] When I asked the applicants what they understood the period of notice to be and what would happen if they did not give it they replied that it was two weeks and that two weeks' money would be deducted if notice was not given. I am satisfied that the applicants understood this by and at the time the Investigation took place. I am not satisfied that they had that understanding at the time their employment terminated. In any event, they did not give written consent.

[22] Any deductions made from the applicants' wages were illegal.

Holiday Pay – First Period of Employment

[23] The respondent paid holiday pay on a "pay as you go" basis. Section 28 Holidays Act imposes four discrete cumulative (not alternate) requirements:

- There are two classes of employee where holiday pay may be paid with the regular pay. One is fixed term employment regarding agreements to work for less than twelve months in accordance with s 66 Employment Relations Act 2000. The other is genuine casual employment where the basis of employment is so "intermittent or irregular" that it is impracticable for the employer to make provision for a three week annual holiday;
- The employee must agree to the arrangement in his or her employment agreement;
- The holiday pay must be an identifiable component of the pay and not rolled up, indistinguishable in a composite rate;

- The payment must be made at a rate of not less than 6 percent (8 percent from 1 April 2007).

[24] In this case, the applicants were not casual employees and were not employed pursuant to a valid fixed term employment agreement for a period of less than 12 months. They did not agree to such an arrangement and it was not an identifiable component of their pay.

[25] Where a “pay as you go” arrangement fails to meet the requirements of s 28 (1) the terms of s 28 (4) apply. The applicants were not employed for a period of more than 12 months and no set off applies.

Post 2007 Termination Events

[26] Mr Gavri said that on 7 February Mr Resham Singh came to see him with his son and demanded his holiday pay. The employment agreement and the requirement to give notice were discussed.

[27] Mr Gavri received a call from the Community Secretary, Mr K S Bakshi, on 18 February, stating that the applicants had approached him and wanted to mediate. This was agreed to. Mr Gavri agreed to pay three weeks’ wages to settle the matter on 22 February 2007. Mr Bakshi told him the offer had been accepted and to post the cheque directly to the applicants. On 26 March Mr Gavri posted a cheque for \$2,711.85. The cheque was not presented and Mr Resham Singh phoned Mr Gavri saying he wanted more money.

[28] At this stage Mr Gurjinder Singh, acting for the applicants, contacted Mr Gavri and also approached the Labour Department. An investigation by a Labour Inspector followed and Mr Gavri agreed to pay the amount asked for the Labour Inspector, which was \$643.21 for Mr Singh and \$632.73 for Ms Kaur. In reaching his conclusions the Labour Inspector treated the employment as continuous from 18 July 2005 and deducted two weeks’ wages pursuant to clause 13 (the termination clause) of the purported employment agreement.

[29] The applicants disagreed with the Labour Inspector's calculations and conclusions and filed proceedings in the Authority.

Statutory Holiday Pay

[30] The applicants said they had worked all public holidays during both periods of employment and that they had been in cash for public holiday work and for working Sundays. The records show that Sunday payments were not made in cash.

[31] The records also show that some employees other than the applicants did work statutory holidays in 2006 and were paid correctly for doing so. The records also show that the applicants were paid for statutory holidays that they did not work.

[32] Furthermore, in a letter dated 15 July 2007 to the Labour Inspector Mr G P Singh wrote "I have contacted Resham Singh; they could not recollect working on public holidays. But they are sure they have not been paid for public holidays."

[33] The evidence does not satisfy me that the applicants worked on public holidays and that they were paid in cash. The only statutory day worked was Labour Day 2005. They were paid for working that day and were not given a day in lieu. This is the only payment related to statutory holidays that is outstanding.

[34] Section 60 Holidays Act 2003 provides that where an employee has not taken an alternative holiday before the date on which the employment ends s/he must be paid at the relevant daily pay. The relevant daily pay for Ms Kaur was \$90.72 and for Mr Singh \$101.07 gross. The respondent is to pay these sums to the applicants.

Personal Grievance Issue

[35] An employer must be given sufficient details of a personal grievance to be able to address it: *Creedy v Commissioner of Police* [2006] 1 ERNZ 517. The applicants clearly disputed the non-payment of their holiday pay. That is what the community mediation dealt with. The evidence of Messrs Tarsem Singh and Sukhdev Singh Sandhu is that no issue was raised regarding the termination itself. None of the correspondence at the time refers to a personal grievance.

[36] I am satisfied that the applicants did not raise a personal grievance within 90 days.

Holiday Pay - Second Period Of Employment

[37] The employer was not entitled to deduct the applicants' holiday pay.

[38] Ms Kaur earned \$26,615.03 gross in the period of employment commencing in February 2006 and ending in January 2007. Mr Resham Singh earned \$30,167.66 gross in that period. Six per cent of Ms Kaur's gross income is \$1,596.90 and of Mr Singh's is \$1,810.06. That is the amount of holiday pay owing to the applicants. The respondent is to pay these sums to the applicants.

[39] It is a pity that the applicants did not accept the net amount of holiday pay initially offered by the respondent after the community mediation.

Costs

[40] Costs were reserved. If the parties are unable to resolve the issue of costs the applicants should file a memorandum within 28 days of the date of this determination. The respondent should file a memorandum in reply within 14 days of receipt of the applicants' memorandum.

Dzintra King
Member of the Employment Relations Authority